Supreme Court, U. S.
FILED
APR 8 1976

No. 75-1431

In the

Supreme Court of the United States

OCTOBER TERM, 1975

HERBERT L. STERN, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA and MALCOLM P. GARDNER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Scheffer Press, Inc.—(312) 263-6850

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	10
I. The Decision Below Raises Significant Questions Involving The Time Of Accrual Of Causes Of Action Under The Statute Of Limitations Provided For In 28 U.S.C. §2415 Which Have Not Been, But Should Be, Settled By This Court	10
II. The Decision Below Conflicts With Prior Decisions Of Another Court Of Appeals And Of This Court By Failing To Recognize The Derivative Nature Of Claims Under 31 U.S.C. §§191, 192 For Purposes Of The Statute Of Limitations In 28 U.S.C. §2415	19
III. The Effect Of The Decision Below Is Shockingly Unjust	22
Conclusion	24

TABLE OF CASES AND STATUTES CITED

CASES

Shepard v. *Thompson*, 122 U.S. 231, 235 (1887) 15

United States v. *First Huntington National Bank*, 34 F. Supp. 578 (S.D. W.Va. 1940), aff'm *per curiam* 117 F. 2d 376 (4th Cir. 1941) 21

United States v. *Franklin National Bank*, 376 F. Supp. 378, 383 (D.C. N.Y. 1973) 11

PAGE

United States v. *Motsinger*, 123 F. 2d 585 (4th Cir. 1941) 20, 21, 22

United States v. *Spitzer*, 261 F. Supp. 754 (S.D. N.Y. 1966) 10

United States v. *Updike*, 281 U.S. 489 (1930) 20, 21, 22

United States v. *Vibradamp*, 257 F. Supp. 931 (S.D. Cal. 1966) 10

STATUTES

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 5

28 U.S.C. §2415(a) 2, 3, 5, 9, 11, 12, 14, 17

28 U.S.C. §2416 11

28 U.S.C. §1345 4

31 U.S.C. §§191, 192 .....2, 3, 5, 10, 19, 20, 21, 22, 24

MISCELLANEOUS

4 C.F.R. §105.1 12

32 C.F.R. §163.112 .....4, 12, 13, 14

§163.26 4

§163.106(b) 4

2 U.S. Code Congressional and Administrative News 2502, 2504 (1966) 11, 12, 14, 17, 18

51 Am. Jur. 26, "Limitations of Actions" §328, 329 .. 14

1 *Williston on Contracts*, 3d ed. §170 15

Appendix E-608, Armed Services Procurement Regulation 7

Treas. Reg. §301.6501(c)-1(d) 18

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The petitioner, Herbert L. Stern, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered below in this proceeding on January 9, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals (No. 75-1327, not yet reported) appears in the Appendix hereto. The opinion of the United States District Court for the Eastern District of Michigan, Southern Division, (Civ. No. 4-70620, not reported) also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit, reversing the order of the District Court which had granted petitioner's motion for summary judgment, was entered on January 9, 1976. This petition for certiorari was filed within 90 days after that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether the Government's suit was barred by the Statute of Limitations under 28 U.S.C. § 2415(a), and in this regard:

1. Whether an action for violation of statutory duty and imposition of derivative personal liability for corporate obligations under 31 U.S.C. §§ 191, 192 is barred if the original claim against the corporation is time barred?

2. Whether the ruling below, that a deferral agreement pending administrative review constitutes a new contract to pay, the breach of which creates a new cause of action, is in violation of 28 U.S.C. § 2415(a) and would if it stands eliminate that provision as an effective statute of limitations against the Government?

3. Whether the cause of action herein against the corporation arose when the Government asserted its claim in 1967, as petitioner contends, or arose in 1969 under the deferral agreement after completion of administrative proceedings as the Government contends?

4. Whether, if the claim against the corporation did indeed arise in 1969 under the deferral agreement

signed by that corporation, that claim can support a cause of action for violation of statutory duty and imposition of derivative personal liability under 31 U.S.C. §§ 191, 192, for corporate payments allegedly caused to be made by individual officers in 1967 and 1968?

STATUTORY PROVISIONS AND REGULATION INVOLVED

28 U.S.C. § 2415(a) provides in pertinent part:

> (a) Subject to the provisions of Section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided,* That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment . . .

31 U.S.C. § 191 provides in pertinent part:

> Whenever any person indebted to the United States is insolvent, . . . the debts due to the United States shall be first satisfied . . . .

31 U.S.C. § 192 provides in pertinent part:

> Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall be-

come answerable in his own person and estate to the extent of such payments for the debts so due to the United States . . . .

32 C.F.R. § 163.112 provides in pertinent part:

> Appeals by contractors will not suspend or delay collection action. * * * In order to minimize the possibility of overcollections, requested deferments pending the outcome of appeals should be freely granted by the contract financing office (§ 163.26), when the contractor enters into agreements acceptable to the contract financing office as reasonably assuring diligent prosecution of the appeal and full payment of any amount determined due upon decision of the appeal or upon further negotiations without such decision, with interest on such amount at the rate and for the period mentioned in § 163.106(b). * * * To avoid possible undue hardship to small business concerns or those contractors who are financially weak, deferments pending the outcome of appeals should be granted on such terms and conditions as may be deemed reasonable by the contract financing office, notwithstanding financial weakness of the contractor and notwithstanding its inability to furnish good collateral security. * * *

STATEMENT OF THE CASE

1. Proceedings and pleadings below

Jurisdiction arose in the District Court under 28 U.S.C. § 1345. Suit was filed by the United States against Malcolm P. Gardner[1] and Herbert L. Stern for alleged violation of their statutory duty and to assert individual liability under 31 U.S.C. §§ 191, 192. It was alleged that despite a debt to plaintiff of a corporation called Drillmation, Inc. (hereinafter "Drillmation") which arose from Government notices of contract terminations and demand in mid-1967 for repayment of progress payments, upon liquidation of Drillmation in 1967 the remaining assets of Drillmation were paid by defendants to creditors other than the United States. It was alleged that such payments in violation of statutory duty were made over a period of time from May of 1967 through April 10, 1968. It was further alleged that Drillmation (by its president Gardner) signed an agreement on January 14, 1968, deferring collection of the Government claim pending administrative appeals of that claim to the Armed Services Board of Contract Appeals; that after rulings by that Board in May of 1969 sustaining the Government claims, the debt of Drillmation became due and payable; and therefore the defendants were individually liable by reason of the payments to other creditors made by Drillmation a year earlier. Gardner had been president at the time of such payments; Stern had been corporate secretary and attorney.

[1]Mr. Gardner died during pendency of the proceedings below. His Estate has not yet been formally substituted. While he adopted petitioner's position below and it is possible that his Estate may adopt this Petition, he is presently joined as a respondent hereto.

Defendants moved for summary judgment based upon assertion of the six year statute of limitations against the Government under 28 U.S.C. § 2415(a), in that suit was filed on November 6, 1973, on a right of action which was based on the claim against Drillmation which arose in mid-1967. The District Court sustained that motion, granted summary judgment, and dismissed the action by final order.

Appeal was then taken to the Sixth Circuit Court of Appeals which obtained jurisdiction under 28 U.S.C. § 1291. The Sixth Circuit ruled that the 1968 deferral

agreement executed by Drillmation constituted an independent contract to pay the claims, which contract was breached by Drillmation in 1969. Therefore, it ruled that the six-year limitation period had not run against Drillmation when the suit was filed in 1973. Because limitations had not run against the company, the decision reinstated the suit against the defendant individuals for payments allegedly caused to be made by them in 1967 and early 1968, over one year prior to the 1969 breach on which the Court of Appeals found the action was based.[2] From the decision of the Sixth Circuit reversing the District Court, this Petition for Certiorari is brought.

2. Statement of Facts[3]

In February and May of 1966, the Government and the Department of the Army entered into two contracts with Drillmation, Inc., a Michigan corporation, for production of carbine bolts and flash suppressors. Drillmation delivered part, but not all of the goods contracted for. In January of 1967, Drillmation applied to the Army for additional compensation under the contracts, asserting that production difficulties had ensued because of unsound advice by Army metallurgists and failure of the Army to supply promised production equipment. That request was denied by the contracting officer.

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[2]In so holding, the Sixth Circuit failed to reach two alternative theories of the Government: First, that the deferral agreement was a contract to toll the statute of limitations during the pendency of the administrative appeal; and secondly, that the Government's cause of action did not accrue until the petitioner's payment of debts of the company in violation of the Government's priority.

[3]Petitioner has requested the Clerk of the Court of Appeals for the Sixth Circuit to certify the complete Record on Appeal to this Court.

On April 21, 1967, Drillmation gave notice to the U.S. Contracting Officer that it was unable to proceed with performance of either contract. In that month, the Army was expressly advised that, absent the requested additional compensation, the company would "go out of business" and that "liquidation" would ensue.

On May 19 and 24, 1967, the United States formally gave notice to Drillmation that it was in default on the two contracts. On June 6, 1967, the Administrative Contracting Officer made a demand upon Drillmation in unequivocal terms for the debt claimed by the Government:

> "Reference is made to Contracts DA-19-058-AMC-1509 (W) and DA-19-058-AMC-1645(W) terminated for default by letter notices dated 18 May 1967 and 24 May 1967, respectively.
>
> Under paragraph (h) of the Progress Payment provision of these contracts your firm received progress payments totaling $1,491,121.46 (Contract DA-19-058-AMC-1509(W), and $160,583.34 (Contract DA-19-058-AMC-1645(W).
>
> This letter constitutes a written demand for payment, pursuant to Appendix E-608 of the Armed Services Procurement Regulation, for recovery of the unliquidated amounts of the progress payments made to your firm.
>
> It is requested that remittance be made by check drawn payable to the Treasurer of the United States and forwarded to this address, "Attn: Office of Data and Financial Management." As provided in Appendix E-608, the full amount must be paid within thirty (30) days from the date of this demand, and any amount not so paid will bear interest at the rate of six (6) per cent per annum from the date of this demand."

Between May and November of 1967, Drillmation liquidated its assets, as it had advised the Army it would do. All assets (except equipment returned to the Govern-

ment) were surrendered to a lienholder, the American National Bank of Chicago. That Bank sold those assets, satisfied its lien, and turned over a balance of $170,528.43 to Drillmation (which had changed its name to Eight Mile Road Defense Contractors, Inc. because the original name had been sold). Defendant Gardner was president of the company, and Defendant Stern was its secretary and attorney.[4] That balance was then distributed in several payments between May of 1967 and April 10, 1968, partly to pay the costs of liquidation (including some small costs paid to the Army) and partly by way of pro rata distribution to creditors, and thereafter the company ceased to operate. The Government does not contend that Gardner, Stern, or anyone else personally benefitted by or misapplied any of the money, but it is that sum that is sought to be recovered from Stern and Gardner.

In the meantime, on January 19, 1968, the company (through its president Gardner) entered into an Agreement (previously signed by the U.S. Contracting Officer on October 12, 1967). The company had appealed the Government's finding of a debt due the United States. While that Agreement included a provision for payment of debt asserted by the Government if the appeal were lost (subject to the company's "right to move for reconsideration or to pursue other such remedies at law as it may have") another provision was added by the company and accepted by the Government:

> "8. Nothing herein contained shall constitute a representation by any representative of the contractor as to the contractor's ability to make any of the payments required hereunder."

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[4]While the District Court below observed that "defendants" distributed the monies in question, that statement was based on an agreed statement of facts that makes clear that the distribution was made by the company.

The company denied any debt (Agreement, ¶ 2). The Government gave up no right under the Agreement, but merely agreed (¶ 6) to defer circulation of the company's name on lists of recalcitrant debtors and to delay reference of the matter to the Department of Justice for collection until after the administrative appeal was decided.

While the Government's Brief before the Sixth Circuit asserted that the Agreement relinquished its "right to recoup its losses from general payments otherwise due to Drillmation," the record of this case is devoid of any claim by the Government that there was a penny of any such payments due or paid Drillmation. There were no other Government contracts with Drillmation.

At no time does the record disclose any request by the Government that any liquidation surplus be retained to satisfy its priority claim, though it was aware of the liquidation, received back its equipment, and knew the company was going out of business.

The administrative appeals of the company were decided and denied on April 10, 1969 and April 11, 1969. Over four and one-half years passed. Then, the instant suit was filed on November 6, 1973. The Complaint alleges that Drillmation was indebted in the amount of $1,541,321.60 as of October 12, 1967.

Defendants moved below for summary judgment based on the six-year statute of limitations under 28 U.S.C. § 2415(a). The District Court granted that motion, which decision was later reversed by the Court of Appeals. Consequently, the issue of whether Stern, who was corporate attorney, can be held liable under 31 U.S.C. §§ 191, 192 for his legal advice merely because he was also corporate secretary, and despite the fact he did not personally make the questioned payments, was not ripe for assertion below because of the successful assertion by both defendants of the statute of limitations.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW RAISES SIGNIFICANT QUESTIONS INVOLVING THE TIME OF ACCRUAL OF CAUSES OF ACTION UNDER THE STATUTE OF LIMITATIONS PROVIDED FOR IN 28 U.S.C. § 2415 WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

1. Congressional intent was thwarted.

Section 2415 of Title 28 of the United States Code provides for barring of all actions by the Government founded on contract, whether express or implied, unless brought within six years after the right of action accrues or within one year after the rendering of final decisions in applicable administrative proceedings, whichever is later.

In a decision ostensibly grounded on the construction of a so-called "deferral agreement", whereby the Government agreed to delay set-off and collection procedures with respect to disputed contract obligations pending the determination of administrative appeals, the Sixth Circuit has greatly reduced and perhaps eliminated entirely the protection of the foregoing statute of limitations afforded to private parties against Government contract claims in a way contrary to both the letter and spirit of the statute.

Prior to 1966, there was no statute of limitations against the Government either generally or as to 31 U.S.C. §§191, 192, specifically. *United States* v. *Spitzer*, 261 F. Supp. 754 (S.D. N.Y., 1966); *United States* v. *Vibradamp Corp.*, 257 F. Supp. 931 (S.D. Cal., 1966). All of this was changed, however, by the passage of 28 U.S.C. §2415, the legislative purpose of which was to place the Government as nearly as possible in the position of a private litigant

in order to terminate stale government claims and to end the inequities which existed as a result of governmental immunity from the operation of the statute of limitations. *2 U.S. Code Congressional and Administrative News*, 2502, 2503 (1966); *United States* v. *Franklin National Bank*, 376 F. Supp. 378, 383 (E.D. N.Y. 1973). The legislative intent behind the language of 28 U.S.C. §2415(a) with respect to administrative proceedings was to toll the statute of limitations (*if and only if* it otherwise would have expired) by those proceedings, *2 U.S. Code Congressional Administrative News*, 2502, 2504 (1966):

> "Subsection (a) of new section 2415 added by the bill provides for a 6-year limitation which would apply to *all* Government actions *based on contracts* whether expressed or *implied* in law or in fact. This provision would extend to obligations which are based on quasi-contracts. In all such contract matters, the action would be barred unless it were brought by the Government within 6 years *after the right of action accrues*, or within 1 year after a final decision in a *required administrative proceeding*. This last provision, which has the effect of *tolling* the running of statute of limitations *during mandatory administrative proceedings*, is necessary because of the great number and variety of such proceedings made possible by current statutes. *An administrative proceeding ordinarily consumes a considerable period of time and, as has been noted, the bill would permit the Government a year after the final administrative decision in which to present its case for judicial determination. An example of such an administrative proceeding are those which involve appeals under the 'disputes' clause of government contracts.*" (Emphasis supplied)

It is no mystery why the Government readily entered into an agreement to avoid putting Drillmation on "Hold-Up" lists and to refrain from sending the file to GAO or the Justice Department for collection. Applicable regulations authorize that agreement even when the contractors' financial position is risky (see 32 CFR § 163.112). Moreover, 28 U.S.C. § 2415 (a) clearly tolls the statute of limitations for the period of the pendency of such administrative proceedings and for at least one year thereafter. But, indeed, even under the government's regulations, the administrative appeal by Drillmation did not suspend collection efforts (see the first sentence of 32 CFR § 163.112) and, governmental regulations provide for safeguarding the statute of limitations if it is a problem. See 4 CFR § 105.1.[3] However, by the terms of 28 U.S.C. §2415(a), timeliness was not a problem—indeed, it was not even a consideration when the agreement was signed.

Both the wording of the limitations statute and its legislative history make it clear that Congress intended the statute to embody its own provision for tolling of the statute during the pendency of mandatory administrative proceedings. 2 *U.S. Code Congressional and Administrative News* 2502, 2504 (1966). For this reason, the statute is worded in the alternative, providing an additional one-year period within which the Government may bring suit in the event that administrative proceedings continue for more than six years after the cause of action accrues.

[3] "Such referrals should be made as early as possible consistent with aggressive agency collection action and . . . [i]n any event, well within the time limited for bringing a timely suit against a debtor." 4 CFR § 105.1.

Congress clearly did not intend that administrative proceedings would start the six-year limitations period anew. Yet, this is, in effect, what the Sixth Circuit has done. It has construed the "deferral agreement" to give rise to an independent cause of action for the original debt and thereby to a new period of limitations. This result is not only contrary to the plain meaning of the limitations statute. It also is based on a misreading of the purpose and terms of the deferral agreement. The agreement and the underlying regulations of the Defense Department* set-offs and enforcement pending the outcome of administrative appeals in order to minimize overcollection and to avoid undue hardship on small businesses or those contractors who are financially weak. 32 C.F.R. § 163.112. The "deferral agreement" contains no acknowledgment of the underlying debt. To the contrary, it contains a specific provision denying existence of such debt and disclaimer of ability to pay it. Nor does the agreement even refer to the statute of limitations or purport to extend or waive it. Since the alternative contingency for the pendency of administrative appeals is contained in the limitations statute itself, it was unnecessary for the parties to make special provision for its extension. To hold that the parties have done so under these circumstances, and have done so unwittingly, ignores Congressional intent, apparent on the face of the statute, that the statutory extension governs in case of administrative appeal.

2. There was no unequivocal promise to pay.

In ruling that the agreement gave rise to a new cause of action, the Sixth Circuit cited the well-established principle of contract law that a new promise to pay an existing debt may give rise to a new enforceable promise and

*clearly had the limited purpose of deferring

extend the time for enforcement. But beyond using that rule to avoid the intent of §2415(a), the Sixth Circuit ignored the commonly accepted limits on that principle of contract law.

The legislative intent of 28 U.S.C. § 2415 was to put the Government into the place of the private litigant. 2 *U.S. Code Congressional and Administrative News* 2502, 2503 (1966). And it is crystal clear that, where a private litigant is concerned as to a written acknowledgment for debt, the following rule applies, 51 Am. Jur. 2d, *Limitations of Actions* § 328:

> "An acknowledgment of a debt, to remove the bar of the statute of limitations, must be a distinct, unqualified, unconditional recognition of an obligation for which the person making the admission is liable. If there are accompanying circumstances which repel the presumption or implication of a promise or intention to pay—if the expression is equivocal, vague or undeterminate, leading to no certain conclusion . . . they ought not to go to a jury as evidence of a new promise. . . ."
>
> • • •
>
> "Applying the foregoing rule, it is held that the following are insufficient to remove the bar of the statute: *declarations by a debtor that he has no funds to pay a debt*; . . . ."
>
> • • •
>
> "A binding promise to pay may be implied from an *unequivocal admission that a debt is due and unpaid, if unaccompanied by anything indicative of an intention not to pay.*" (Emphasis supplied.)

The same principle applies where a new promise to pay is relied on. *Id.*, § 329:

> "In order for an acknowledgment or new promise to suspend or remove the operation of the statute of limitations, there must be an express or implied promise to pay the obligation. In other words, there must be an express unconditional promise to pay the debt, or a conditional promise to pay and evidence of performance of the condition, or an admission or acknowledgment by the debtor of a subsisting debt from which a promise to pay may be implied."

> • • •
>
> "An express promise, to be sufficient, should be clear, explicit, and unequivocal."

If an acknowledgment for debt is to be effective, "there must be a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation of the debtor," *Shepherd* v. *Thompson,* 122 U.S. 231, 235 (1887). If there is the slightest reservation in the document with respect to any intention to pay, there is no acknowledgment of legal effect, 1 *Williston on Contracts,* 3d ed, § 170:

> "If there is anything in the surrounding circumstances, even though not in the words of the acknowledgment, tending to negative such an inference [of an intention to pay] or to leave it in doubt, the indebtedness will not be revived."
>
> • • •
>
> "In order to amount to a new promise the words of the debtor in a pleading must conform to the ordinary requirements of a new promise. If, therefore, any part of the statement of the debtor indicates an intention not to pay the debt, it is abundantly clear that no new liability is created."

The same author gave illustrations of insufficient promises, including:

> ". . . a statement that he would pay the debt if able but saw little prospect of ever being able; . . . ." *Id,* §172.

Williston also points out that the assertion of inability to pay imposes a condition to the promise that will be enforced, if indeed any unequivocal promise to pay can be found in that circumstance:

> "In cases where the debtor asserts present inability, the promise implied should be rather to pay after a reasonable time or when he becomes able, than to pay immediately. A declaration of inability to pay which fairly interpreted relates not merely to the present, but to the future as well, is equivalent to a refusal to pay, and it is immaterial whether or not the debtor also admits the existence of the debt." *Id*, §168.
>
> "The effect of a promise to pay when able is of legal importance not simply with reference to debts barred by the Statute of Limitations, but in other cases. Such promises when supported by consideration are generally, though not universally, upheld and enforced according to their natural meaning. . . .
>
> * * *
>
> "That is, the new promise should bind the promisor to pay on the condition, and only on the condition that he becomes able to do so. This is the generally accepted rule." *Id*, §182.

Keeping these rules in mind, it is clear that sections of the deferral agreement plainly abnegate any possibility that this document could or should be construed as an unequivocal promise or acknowledgment of debt which revived the obligation represented by the alleged breach of contract in April or May, 1967. For example, does the following sound like an unqualified, distinct, unequivocal admission of liability?

> "2. The Contractor denies the existence of such debt. . . ."

Does the following signify a clear willingness to pay especially when viewed in the context of Drillmation's advice to the Government, given ten months earlier, that it would go out of business and liquidate?

> "8. Nothing herein contained shall constitute a representation by any representative of the contractor as to the contractor's ability to make any of the payments required hereunder."

The agreement, moreover, reserved the right of Drillmation to pursue its remedies at law.

Thus, the Drillmation agreement cannot be relied upon to operate either as an acknowledgment of debt or as an unequivocal promise to pay.

The concept of acknowledgment in section 2415(a) is described in the legislative history behind the act which makes it clear that the principle enunciated is a familiar one, embraced by the law of the states, to the effect that the debtor must indicate his willingness to discharge the obligation. 2 *United States Code Congressional and Administrative News*, 2502, 2504 (1966). The agreement simply does not come within the rule since it is filled with denials and qualifications.

Petitioner does not suggest that a private party and the Government may never extend or toll the statute of limitations by acknowledgment or agreement. The statute itself recognized this possibility by providing that "in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment." But, as has been shown, the "deferral agreement" contains no written acknowledgment of debt and the Government has not contended that it did. To find a new promise to pay

in a standard form deferral agreement used for other purposes in aid of administrative appeals does violence to Congressional intent.[5]

3. Conclusion.

"Deferral agreements" are specifically authorized by the regulations of the Department of Defense[6] and their use is widespread. Unlike the plain wording of forms used by the Internal Revenue Service for the fixing of the period of limitations upon the assessment of income taxes by agreement of the parties,[7] the "deferral agreement" used by the Department of Defense is completely devoid of any reference to the statute of limitations. Given the uncertainty of the force and effect of such "deferral agreements" as a result of the decision of the court below, this Court should act to cure this unwarranted construction to prevent further Government abuse. Such agreements commonly used during administrative appeals should not be read to by-pass the effort of Congress to impose reasonable limitations on the Government in collections of debts allegedly due it.

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[5] The legislative history makes it clear that the statute was intended to assure private litigants "a more fair and balanced treatment when dealing with the Government. . . . The committee agrees that the equality of treatment in this regard provided by this bill is required by modern standards of fairness and equity." 2 *U.S. Code Congressional and Administrative News* 2502, 2503 (1966).

[6] See 32 C.F.R. § 163.112.

[7] See Form 872 (Rev. July, 1970) "Consent Fixing Period of Limitation Upon Assessment of Income Tax," pursuant to 26 U.S.C. § 6501(c)(4); Treas. Reg. § 301.-6501(c)-1(d).

The Congress first adopted in 1966 the statute imposing limitations of six years on Government contract claims. Few cases have arisen under it because it is so recent. That statute has now begun to bar many stale claims. But the Sixth Circuit decision raises the question of whether Congressional intent will be thwarted. Only this Court can resolve that question.

II.

THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF ANOTHER COURT OF APPEALS AND OF THIS COURT BY FAILING TO RECOGNIZE THE DERIVATIVE NATURE OF CLAIMS UNDER 31 U.S.C. §§ 191, 192 FOR PURPOSES OF THE STATUTE OF LIMITATIONS UNDER 28 U.S.C. § 2415.

In holding that the "deferral agreement" constituted an independent promise to pay from which the six-year statute of limitations was held to have run anew, the Sixth Circuit failed to recognize another critical issue in the case, namely, the derivative nature of a claim under 31 U.S.C. §§191, 192. The Government had argued below, as an alternative theory opposing petitioner's motion for summary judgment, that its cause of action against petitioner arose at the time that Drillmation's assets were distributed to its creditors. Had the Court of Appeals considered this issue, it should have recognized, as did the District Court in this case and the Court of Appeals for the Fourth Circuit in a prior decision, that action by an individual which violates the priority rule of 31 U.S.C. § 191 does not give rise to an independent cause of action which causes the statute of limitations to run anew. Accordingly, a claim brought against that individual under 31 U.S.C. § 192 is not an independent cause of action. Rather it is an action to enforce the original claim against a different party and,

as such, is subject to the statute of limitations governing the original claim.

Thus, in *United States* v. *Motsinger*, 123 F. 2d 585 (4th Cir. 1941), the Court of Appeals held that an action under 31 U.S.C. §192 to collect certain tax deficiencies against a fiduciary, to whom assets of the taxpayer had been transferred in trust and who had distributed them without paying the tax assessed against the taxpayer, was barred by the applicable statute of limitations since suit was filed more than six years after the assessment of the tax against the taxpayer. The notion that the statute of limitations could run longer against a fiduciary than it could against the original debtor was rejected:

> "To treat the liability of the fiduciary as an entirely new and independent liability and to close one's eyes to the patent fact that it is, in reality, the old tax liability of the original taxpayer which is being enforced against the fiduciary, is to deny the fiduciary this liberal construction to which he is entitled and to invoke against him the harshest sort of technicality."

123 F. 2d at 589.

In so holding, the Fourth Circuit relied on the decision of this Court in *United States* v. *Updike*, 281 U.S. 489 (1930), which involved a suit to collect from the stockholders of a corporation, to whom its assets had been distributed, certain income taxes assessed against the corporation. The reasoning of this Court in *Updike* is directly applicable here:

> "It seems plain enough, without stopping to cite authority, that the present suit, *though not against the corporation but against its transferees to subject assets in their hands to the payment of the tax, is in every real sense a proceeding in court to collect a tax. The tax imposed upon the corporation is the basis of the liability, whether sought to be enforced directly against the corporation or by suit against its transferees.* The aim in the one case, as in the other, is to enforce a tax liability, and the effect of the language above quoted from Section 280 is to read into that section, and make applicable to the transferee equally with the original taxpayer, the provision of section 278(d) in relation to the period of limitation for the collection of a tax."

281 U.S. at 494 (emphasis added).

The Fourth Circuit in *Motsinger* correctly recognized that the reasoning of this Court in *Updike* applied notwithstanding the fact that liability was asserted in the former case against the defendant as a fiduciary and in the latter case as a transferee. Similarly, it should make no difference that the particular statute of limitations involved in those cases was different from the statute of limitations involved here. The thrust of *Motsinger*, as recognized by the District Court below, is that liability under 31 U.S.C. §§ 191, 192 is derivative, and hence it accrues at the same time as the debtor's liability for the original debt. Accord, *United States* v. *First Huntington National Bank*, 34 F. Supp. 578 (S.D.W. Va. 1940), affirmed *per curiam*, 117 F. 2d 376 (4th Cir. 1941).

The Sixth Circuit opinion did not respond to the foregoing authorities cited to it. Principles set forth by this Court and followed by the Fourth Circuit as applicable to collection of taxes should be applied to this clearly parallel situation involving a claim under 31 U.S.C. §§ 191, 192. By failing to do so, the Court below rendered an opinion in conflict with that prior authority. That

conflict is not at first apparent because the Appeals Court purported to find a new debt arising from a 1969 breach of the deferral agreement. But the thrust of the decision is to accomplish the very end that this Court in *Updike* said was wrong, and that the Fourth Circuit in *Motsinger* said would impose "the harshest sort of technicality."

III.

THE EFFECT OF THE DECISION BELOW IS SHOCKINGLY UNJUST.

The Government has used a bootstrap theory that prevailed in the Sixth Circuit. Individuals are here held to answer for payments during 1967 and early 1968 allegedly made in violation of the statutory duty to satisfy first "the debts due the United States" from Drillmation. 31 U.S.C. §192. Yet the "debts due the United States" in mid-1967 and clearly claimed by the Government that year are time-barred. To avoid this, the Government asserted and the Appeals Court below agreed that the "debts due" on which suit was brought were those which arose under the deferral agreement in 1969 after the administrative reviews were completed.

Through tortuous reasoning the Government has managed to get the best of all possible worlds—an earlier date of accrual of its cause of action for purposes of asserting a derivative claim against petitioner under 31 U.S.C. §§ 191, 192, and also a later date of accrual for purposes of the statute of limitations.

Accordingly, petitioner and the other defendant must defend claims of individual liability for at least $170,528.63 for their alleged actions in 1967 and 1968 based upon a *subsequent*-arising debt due the Government from their

Company, despite the fact that the debts *earlier* due the Government are clearly time-barred!

The Government cannot have this grossly unfair position. First, it is unfair and contrary to the statute of limitations that a deferral agreement on the Government's form commonly used, which makes no mention of statute of limitations, is read to create a new debt and thus avoid any limitations bar, particularly where it is not claimed that the United States did more than defer its collection efforts as a result. Second, it is unfair that the United States can apply the effect of that new debt of the corporation *retroactively* to impose liability on the corporate officers and attorney for their prior alleged conduct, the good faith of which is not questioned.

Here the original debt arose in mid-1967 and the United States waited more than six years to sue on it. It made no claim when notified about the liquidation so that the parties could be informed of their statutory liabilities; it made no claim when it was still possible to appeal the adverse administrative ruling, and perhaps defeat the underlying corporate liability; and it made no claim while records of the defunct company were still available to aid defense. Instead, it waited an astounding period of time after the administrative review, and then sued individuals for the violation of an obscure statutory priority in an effort to collect from them for payments from which they are not asserted to have benefited. Because the agency and the Justice Department disregarded the provisions of the new statute of limitations adopted in 1966, they sought to recoup from their delay by asserting an entirely new significance to the standard deferral agreement.

One further point must be made on behalf of petitioner Stern. The deferral agreement was signed only by cor-

poration president Gardener. Nowhere did petitioner Stern sign. Assuming—and it is a huge assumption—that the agreement somehow operates as an acknowledgment or promise of debt that extended the statute of limitations vis-à-vis Drillmation, it is a long step to apply such an extension to apply liability under 31 U.S.C. §§ 191, 192 against a man who never signed it.

The total effect is shockingly unjust. On this basis alone, the Court should grant certiorari to protect unwitting citizens from a collection effort of their Government that is most harsh in the context of this type of case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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April 8, 1976.

APPENDIX

UNITED STATES DISTRICT COURT
Eastern District of Michigan
Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,

v.

MALCOLM P. GARDNER and HERBERT L. STERN, JR.,
Defendants.

Civil No. 4-70620

MEMORANDUM AND ORDER

The Department of the Army entered into two defense contracts with Drillmation Co., Inc. (Drillmation) dated February 8, 1966, and May 17, 1966. Drillmation soon began to experience production difficulties and applied to the Army for additional compensation. The application asserted that the difficulties encountered were brought about by unsound advice rendered by Army metallurgists and the Army's failure to deliver promised production equipment. On April 21, 1967, Drillmation advised the Army Contracting Officer it was unable to continue performance. On May 19, 1967, the contracting officer defaulted Drillmation's February 8, 1966, contract; and on May 24, 1967, the contracting officer defaulted Drillmation's May 17, 1966 contract. Drillmation unsuccessfully appealed both terminations to the Armed Services Board of Contract Appeals (ASBCA). On June 2, 1967, Drillmation sold its unrelated Army assets and changed its name to Eight Mile Road Defense Contractors, Inc.

(Eight Mile Inc.). All remaining assets of Eight Mile, Inc., were surrendered to a lien-holding bank, which after sale and satisfaction returned $170,528.43 to defendants as surplus. The defendants, officers of Eight Mile, Inc., while aware of the obligation due the United States, distributed this amount to general creditors and did not pay any part of the indebtedness due the government.

The United States filed this action to recover $170,528.43 defendants paid to general creditors contrary to the priority to which the United States was entitled under 31 U.S.C. §191. The complaint avers that defendants became personally liable pursuant to 31 U.S.C. §192 for sums so distributed to other creditors. Pursuant to a Stipulation of Facts filed by the parties, defendant Stern filed a motion for summary judgment. He contends that the statute of limitations bars the government's cause of action.[1] Specifically, the defendant argues that the government's cause of action accrued on April 21, 1967, the date Drillmation informed the Army contracting officer it could no longer perform under the contract; or, at the very latest, on May 19 and May 24, 1967, the dates the government defaulted both Drillmation contracts. The government, in turn, relies upon an agreement signed in

[1] Defendant relies upon 28 U.S.C. §2415 which in pertinent part provides:

> "(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later. . . ."

its behalf by the Defense Supply Agency Contracting Officer on October 12, 1967, and by defendant Gardner for Eight Mile, Inc., on January 19, 1968. That agreement provided that the Defense Supply Agency would refrain from circulating the name of Eight Mile, Inc., on certain government lists and from transferring the matter to the United States General Accounting Office or Department of Justice before 45 days after the ASBCA decision on the appeal was published and then to do so only if Eight Mile, Inc., failed to pay the amounts owing within the 45-day period. The government argues that this was a necessary procedure before instituting suit. Therefore, the government continues, the agreement had the effect of delaying the accrual date of the cause of action until 45 days following the ASBCA decision. The ASBCA rendered its decision on April 10, 1969, so the government argues that the cause of action accrued 45 days later on on May 24, 1969.

A cause of action arising by contract accrues at the time a breach occurs. The breach of the contracts in question occurred no later than May 19 and May 24, 1967, the dates the government placed Drillmation in default on the two contracts. 51 Am. Jur. 2d, Limitations of Actions, §126.[2] The agreement relied upon by the government cannot and does not delay the accrual date

[2] A breach may well have occurred on April 21, 1967, the date Drillmation gave notice to the government that it did not intend to proceed on either of the two contracts. If this action were considered an anticipatory breach, the opposite party may well have treated it as a breach in fact and the statute of limitations would begin to run as of that date. Here, the government obviously elected to treat Drillmation's notice as a breach and soon thereafter defaulted Drillmation on both contracts.

for its cause of action. 28 U.S.C. §2415 contains a specific provision for pursuing relief through administrative proceedings. That statute extends the limitation on a contract action for one year after a final administrative determination, if the original six-year period has run before that time. It does not alter the general rule for determining when a contract action accrues. The conclusion apparent from this provision is that an administrative proceeding neither tolls the statute nor creates a right of action. It merely extends the life of a cause of action when administrative proceedings are not concluded within six years of the date the action accrues. The act does not make any provision for tolling the statute during the 45-day period during which the government agreed not to attempt collection of the amount found due and owing by the ASBCA decision. The agreement provides for delaying collection efforts through the General Accounting Office and does not include an agreement to refrain from instituting suit. It is apparent, therefore, that this cause of action accrued at the time the agreement was breached and no later than May 19 and May 24, 1967, the dates the government defaulted both Drillmation's contracts; this being beyond the six-year limitation provided by the statute, the government's cause of action is barred.

The government also contends that under 31 U.S.C. §§191, 192, a cause of action does not accrue until the date a fiduciary ignores the government's priority by paying funds to other creditors. However, these sections only provide for an alternative method of collection. The original cause of action pursuant to these provisions nevertheless accrues on the date that the original debt accrued against the fiduciary's principal. *United States* v. *Motsinger,* 123 F.2d 585 (4th Cir. 1941).

Accordingly, IT IS ORDERED that the defendants' Motion for Summary Judgment be and hereby is granted.

/s/ Robert E. DeMascio
Robert E. DeMascio
United States District Judge

Dated: September 30, 1974

UNITED STATES DISTRICT COURT
Eastern District of Michigan
Southern Division

UNITED STATES OF AMERICA,

Plaintiff,

v.

MALCOLM P. GARDNER and HERBERT L. STERN, JR.,

Defendants.

Civil No. 4-70620

JUDGMENT

This action came before the court on defendant Stern's Motion for Summary Judgment, and the court having rendered its memorandum of fact and law,

IT IS ORDERED AND ADJUDGED

that the action be dismissed on the merits.

Dated at Detroit, Michigan, this 30th day of September 1974.

/s/ Robert E. DeMascio
Robert E. DeMascio
United States District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1327

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MALCOLM P. GARDNER and HERBERT L. STERN, JR.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed January 9, 1976.

Before: PHILLIPS, *Chief Judge*, MCCREE, *Circuit Judge*, and MCALLISTER, *Senior Circuit Judge*.

PHILLIPS, *Chief Judge*. The sole issue on this appeal is whether the United States, on the facts here presented, is barred from suing on its debt priority under 31 U.S.C. §§ 191 and 192[1] and by the statute of limitations set forth

[1] 31 U.S.C. § 191 provides in part as follows:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; . . . .

31 U.S.C. § 192 provides as follows:

> Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by

in 28 U.S.C. §2415.[2] The District Court determined, *inter alia*, that the right of action accrued on the date of the company's default, and that the Government's suit is barred by the statute. We reverse and remand.

In 1966, Drillmation, Inc. (the Company) entered into two contracts with the Department of the Army for carbine bolts and flash suppressors. The Company encountered difficulties in proceeding with both contracts and eventually notified the Army on April 27, 1967, that it was unable to continue performance. The Government contracting officer then terminated the two contracts for default on May 19, 1967, and May 24, 1967, respectively. Pursuant to the standard "disputes clause"[3] of the con-

[1] (Continued)

> the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

[2] 28 U.S.C. § 2415 provides in part as follows:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year* final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided* . . . .

[3] 32 C.F.R. § 597.103-12(a) cites the standard dispute clause as follows:

> (a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who

* after

tracts, which provides for an administrative appeal from the decision of the contracting officer to the Armed Ser-

[3] (Continued)

shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days of the receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to ..... [*] ..... The decision of the ..... [*] ....., or his duly authorized representative (other than the Contracting Officer under this contract) for the determination of such appeals shall be final and conclusive if the amount involved in the appeal is $50,000 or less. If the amount involved exceeds $50,000 such decision shall be final and conclusive unless, within 30 days after receipt by the Contractor thereof, the Contractor furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals, or of the ..... [*] ..... in the case of appeals involving amounts of $50,000 or less, shall be final and conclusive [1. unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence.] [2. to the extent permitted by U.S. law.] In connection with any appeal proceeding under this clause, the contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: *Provided*, That nothing, in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

vices Board of Contract Appeals (ASBCA), the Company appealed from the contracting officer's factual finding that it had defaulted on the contracts.

Between May and November 1967, the Company sold its unrelated Army assets and changed its name to Eight Mile Road Defense Contractors, Inc. (Eight Mile Inc.). All remaining assets of Eight Mile Inc. were surrendered to its lienholder, the American National Bank of Chicago, which after sale and satisfaction of its lien returned $170,528.43 to appellees as surplus. The appellees, officers of Eight Mile Inc., although aware of the obligation due the United States, distributed this amount to general creditors and did not pay any part of the indebtedness owed to the Government.

On January 19, 1968, pending the appeal to the ASBCA, Eight Mile Inc. entered into a contract with the Government whereby the Army agreed not to put Eight Mile Inc. on certain Government lists and not to refer the debt to the General Accounting Office until 45 days after the ASBCA decision.[4] This deferral agreement also provided that Eight Mile Inc. would pay the amount found owing by the ASBCA promptly within 45 days of the decision. Such payment, however, would be without prejudice to the contractor's right to move for reconsideration or to pursue other remedies available at law. The decision of the Appeals Board was handed down on April 10, 1969.

Subsequently, on November 6, 1973, the United States instituted this suit against the appellees, as fiduciaries of Eight Mile Inc., to hold them personally liable for dis-

[4] The Defense Department's regulations also provide for the maintenance of a "Hold-Up List", which is circulated to all governmental contracting agencies, and which alerts them to contractors whose payments should be held up and offset against existing debts. *See* 32 C.F.R. § 163.106-1; 32 C.F.R. § 163.86(e); 32 C.F.R. §163.87.2; 32 C.F.R. § 163.122.

4 C.F.R. § 105.1 provides for referral to the General Accounting Office or to the Department of Justice.

tributing the funds in violation of their statutory duty under 31 U.S.C. § 192. The District Court held that the action was barred by the six year statute of limitations of 28 U.S.C. § 2415, finding that the right of action accrued on the date of default in May 1967.

The Government relies upon three grounds for reversal:

1) That the deferral agreement of January 19, 1968, constituted an independent contract to pay the claim, which was breached by the Company in 1969; therefore, the six year limitation period had not run in 1973 when the Government filed this suit;

2) That, in any event, the deferral agreement was a contract to toll the statute of limitations during the pendency of the appeal to the ASBCA; and

3) Alternatively, that the Government's cause of action under 31 U.S.C. § 192 did not accrue until the defendants' payment of debts in violation of the Government's priority.

We agree with the first ground asserted by the Government. Therefore, it is not necessary to reach the other issues in disposing of this appeal.

28 U.S.C. § 2415(a) (n. 2) provides a six year period of limitations for suits "founded upon any contract express or implied in law or fact." The record demonstrates that the present action is a suit founded on a contract, viz, the deferral agreement entered into between the Company and the Government on January 19, 1968.

The deferral agreement provides in part as follows:

AGREEMENT BETWEEN

DRILLMATION COMPANY, INC. NOW KNOWN AS EIGHT MILE ROAD DEFENSE CONTRACTORS, INC.

1601 Wanda Avenue
Ferndale, Michigan 48220

and

THE DEFENSE SUPPLY AGENCY
CAMERON STATION, ALEXANDRIA, VIRGINIA 22314

1. A Defense Supply Agency (DSA) Contracting Officer by formal decision has found that Drillmation Company, Inc. (Eight Mile Road Defense Contractors, Inc.), hereinafter referred to as the Contractor, owes the U. S. Government a total principal amount of $1,541,321.60 plus interest at the rate of 6% per annum as stipulated on the reverse hereof under Contracts DA 19-058-AMC-1509(W) and DA 19-058-AMC-1645(W).

2. The Contractor denies existence of such debt and has appealed the Contracting Officer's decision to the Armed Services Board of Contract Appeals (ASBCA).

3. The ASBCA has docketed the appeal as No. 12501 for Contract 1509(W) and 12579 for Contract 1645(W).

4. The Contractor agrees to pay to the DSA the amount, plus accrued interest, found due by reason of the ASBCA decision on the appeal, or if the appeal is dismissed by the Board without decision, the amount mentioned in paragraph 1 above. Such payment in either case shall be without prejudice to the Contractor's right to move for reconsideration or to pursue such other remedies at law as it may have. The Contractor further agrees to make such payment in full within 45 days of the date of the ASBCA decision or dismissal of the appeal or to make arrange-

ments within that 45 day period to pay the amount on an installment basis within the bounds of the minimum requirement outlined in paragraph 5 below.

• • •

6. The DSA agrees not to circulate the name of the Contractor on certain U. S. Government lists designed to effect settlement of accounts of recalcitrant debtors and agrees not to transfer the case to the U.S. General Accounting Office or the Department of Justice before 45 days after the ASBCA decision on the appeal is published and to do so then only if the Contractor fails to comply with paragraph 4 above or fails to fulfill any agreement reached under paragraph 5 above.

We hold that the District Court erred in ruling that the cause of action accrued prior to the execution of the deferral agreement, i.e., when the Government contracting officer terminated the construction contract for default.

This action is grounded on the deferral agreement. Paragraph 12 of the complaint avers the execution of the deferral contract under which it was agreed "that the due date of said obligation would be postponed until 45 days after rulings of the Armed Services Board of Contract Appeals" and that, in consideration of the deferment of the claim, the Company agreed "to pay to the United States, within said 45 days whatever amount might be found due by said Armed Services Board of Contract Appeals, plus interest from June 22, 1967."

Paragraphs 23 and 24 of the complaint are as follows:

23. By virtue of the deferred-payment agreement which is described above in paragraph 12, the liability of $1,541,321.60, plus interest, assumed and acknowledged by Eight Mile, became due and payable, partly on May 25, 1969 and partly on May 26, 1969, 45 days after said rulings of said Board.

24. No part of said debt has been paid or collected, although payment has often been demanded.

WHEREFORE, the plaintiff prays judgment against the defendants, jointly and severally, for $170,528.43, interest thereon, and the costs of this action.

When Eight Mile Inc. failed to pay the Government within 45 days of the Board's decision pursuant to the terms of the deferral agreement, a new cause of action accrued under 28 U.S.C. § 2415. The deferral agreement was based on valuable consideration. Under paragraph six of the agreement, the Government agreed not to circulate the Company's name on a "list . . . of recalcitrant debtors" or "transfer the case to the U.S. General Accounting Office or the Department of Justice." The Company, on the other hand, agreed under paragraph four to pay the amount found owing by the ASBCA promptly within 45 days of the decision. However, such payment would not prejudice the contractor's right to file a civil action. The present action was filed within less than six years after the 45th day following the Board's decision—May 26, 1969—and, accordingly, is not barred by limitation. It is well settled that:

> If a debtor makes a new promise to his creditor to pay his existing debt, no bar having yet arisen, this promise is enforceable, being sufficiently supported by the existing legal duty of the promisor. . . . In such a case, the creditor's remedy on the new promise is not barred by statutory limitation until the lapse of the full period counting from the time of breach of this new promise. Such a promise extends the time for enforcement. 1A Corbin *Contracts*, 289.

The judgment of the District Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. The costs of this appeal are assessed against the appellees.

Supreme Court, U. S.
FILED
JUN 3 1976
MICHAEL RODAK, JR., CLERK

No. 75-1431

In the Supreme Court of the United States

OCTOBER TERM, 1975

HERBERT L. STERN, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1431

HERBERT L. STERN, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that this contract action, brought by the United States against petitioner and respondent Gardner, is barred by the six-year statute of limitations in 28 U.S.C. 2415(a).[1]

1. In 1966, the Drillmation Company (the Company) entered into two contracts with the Department of the Army. Difficulties were encountered in performing both contracts, and the Company eventually advised the Army on April 27, 1967, that it was unable to continue performance. The government contracting officer then terminated the two contracts for default, one on May 19, 1967, and the other on May 24, 1967 (Pet. App.

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[1]The pertinent parts of 28 U.S.C. 2415, and of the other relevant statutory provisions, are set out at Pet. 3-4.

7a). As provided in the standard "disputes clause" of the contracts (see Pet. App. 7a, n. 3), the Company appealed to the Armed Services Board of Contract Appeals (ASBCA), challenging the contracting officer's finding that it had defaulted on the contracts (Pet. App. 7a-9a).

In January 1968, while that appeal was pending, the United States and the Company (whose corporate name had been changed to Eight Mile Road Defense Contractors, Inc.) entered into a "deferral agreement," whereby the Army agreed to defer administrative procedures for the collection of its claim until after the outcome of the contractor's appeal to the ASBCA; deferral was to be accomplished by withholding circulation of the Company's name on the government's list of recalcitrant debtors and by delaying the referral of the claim to the General Accounting Office.[2] In return for the government's promised deferral, the Company agreed to pay the government any amount found due by the ASBCA "within 45 days of the date of [its] decision * * *" (Pet. App. 11a).[3]

On April 10 and 11, 1969, the ASBCA denied the Company's administrative appeals, in effect deciding that the Company owed the government more than $1.5

[2]The pendency of a contractor's appeal, while suspending the government's right to institute judicial proceedings against the contractor to collect a claim (*Crown Coat Front Co.* v. *United States*, 386 U.S. 503), does not suspend the government's right to collect a claim administratively (*e.g.*, by offset). The object of deferral agreements is to prevent undue hardship to small business concerns by collection during the pendency of an appeal, and also to avoid overcollections (see 32 C.F.R. 163.112, relevant parts of which are set out at Pet. 4).

[3]Pertinent portions of the deferral agreement are set forth in the Appendix to this memorandum.

million. The Company, however, did not pay this amount to the government in accordance with the deferral agreement (*i.e.*, by May 25-26, 1969, 45 days after the ASBCA's adverse decision), and indeed, still has not paid any of it.

Prior to the denial of its administrative appeals, the Company surrendered all of its assets to a lien-holding bank, which sold the assets to satisfy its lien (Pet. App. 9a). The remainder of the proceeds realized by the sale ($170,528.43) was paid by the bank to the petitioner and respondent Gardner, who were officers of the Company. Petitioner and respondent Gardner distributed these monies to other creditors while aware of the Company's obligation to the United States (Pet. App. 9a). Petitioner states (Pet. 8) that this distribution occurred between May 1967, and April 10, 1968.

On November 6, 1973, the United States commenced this suit in the district court against petitioner and respondent Gardner, claiming that under 31 U.S.C. 192 they were personally liable for distributing the Company's assets in violation of the government's priority under 31 U.S.C. 191. The district court dismissed the complaint, holding that the action was barred by the six-year limitation period of 28 U.S.C. 2415. That Section bars a suit upon any "express or implied" contract "unless the complaint is filed within six years after the right of action accrues * * *" (Pet. 3). In the district court's view, the cause of action accrued in May 1967, when the contracts were terminated for default, and the six-year limitation period had therefore expired when the instant suit was filed (Pet. App. 3a-4a).

The court of appeals reversed, holding that the deferral agreement, in which the Company promised to pay the amount found due by the ASBCA within 45 days of its

decision, *i.e.*, by May 1969, had, upon the Company's failure to perform its agreement, given rise to a new cause of action on that date (Pet. App. 6a-13a). The instant suit, which the court of appeals found was predicated upon the breach of the deferral agreement (Pet. App. 10a, 12a), was therefore timely.

2. The question presented involves only the validity of the determination, for purposes of the statute of limitations, that this particular suit was based upon a breach of the deferral agreement rather than a breach of the underlying contract. That ruling turns upon the meaning of the deferral agreement,[4] and is correct.

By entering into the deferral agreement, the Company expressly agreed to pay the government any amount found due by the ASBCA "within 45 days of the date of [its] decision * * *" (Pet. App. 11a). The effect of such a promise was to require payment of that amount shortly after the administrative decision, without requiring the government to await the outcome of any judicial action the Company might pursue.[5] As the court of appeals held (Pet. App. 13a), the Company's promise "was based on valuable consideration," namely, the government's agreement "not to circulate the Company's name on a 'list * * * of recalcitrant debtors' or 'transfer the case to the U.S. General Accounting Office or the Department of Justice.'"

[4]As petitioner concedes (Pet. 9 substantive questions concerning petitioner's liability under 31 U.S.C. 191-192 (or otherwise) for the Company's breach of the deferral agreement have not been addressed by the courts below and thus are not ripe for review by this Court.

[5]The Company might have sought judicial relief in the Court of Claims (*Crown Coat Front Co.* v. *United States*, *supra*), and if it had prevailed, the government would, of course, have refunded the amount paid under the deferral agreement.

The deferral agreement was therefore a new contract, which, when breached by the Company in May 1969, gave rise to a "new cause of action * * * under 28 U.S.C. 2415" (Pet. App. 13a). The government had until May 1975, to sue for the breach of this contract, and the instant action, filed on November 6, 1973, was therefore timely.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

[6]Contrary to petitioner's assertion (Pet. 22-24), permitting a timely suit by the government for the breach of a promise for which it gave valuable consideration is fair. Petitioner's other specific arguments are beside the point. First, petitioner contends (Pet. 10-13) that 28 U.S.C. 2415 forbids "tolling" the statute of limitations by a contractual provision. But the court below expressly reserved decision on that question (Pet. App. 10a), and held simply that the deferral agreement was an independent promise to pay the amount found due by the ASBCA in 1969, thus giving rise to a new cause of action. Second, there is no conflict between the decision below and *United States* v. *Motsinger*, 123 F. 2d 585 (C.C.A. 4), as petitioner contends (Pet. 20). In *Motsinger*, the court held that a statute of limitations bars a suit against the fiduciary (here the petitioner) when the suit would be barred against the principal debtor (the Company). In this case, by virtue of the deferral agreement, the statute of limitations had not run against the Company, a promisor under the agreement, and hence it did not run against petitioner.

DOJ-1976-06

APPENDIX

AGREEMENT BETWEEN DRILLMATION COMPANY, INC.
NOW KNOWN AS EIGHT MILE ROAD DEFENSE
CONTRACTORS, INC.
1601 Wanda Avenue
Ferndale, Michigan 48220
and
THE DEFENSE SUPPLY AGENCY
CAMERON STATION, ALEXANDRIA, VIRGINIA 22314

1. A Defense Supply Agency (DSA) Contracting Officer by formal decision has found that Drillmation Company, Inc. (Eight Mile Road Defense Contractors, Inc.), hereinafter referred to as the Contractor, owes the U.S. Government a total principal amount of $1,541,321.60 plus interest at the rate of 6% per annum as stipulated on the reverse hereof under Contracts DA 19-058-AMC-1509(W) and DA 19-058-AMC-1645(W).

2. The Contractor denies existence of such debt and has appealed the Contracting Officer's decision to the Armed Services Board of Contract Appeals (ASBCA).

3. The ASBCA has docketed the appeal as No. 12501 for Contract 1509(W) and 12579 for Contract 1645(W).

4. The Contractor agrees to pay to the DSA the amount, plus accrued interest, found due by reason of the ASBCA decision on the appeal, or if the appeal is dismissed by the Board without decision, the amount mentioned in paragraph 1 above. Such payment in either case shall be without prejudice to the Contractor's right to move for reconsideration or to pursue such other remedies at law as it may have. The Contractor further agrees to make such payment in full within 45 days of the date of the ASBCA decision or dismissal of the appeal or to make arrangements within that 45 day period to pay the

amount on an installment basis within the bounds of the minimum requirement outlined in paragraph 5 below.

* * * * *

6. The DSA agrees not to circulate the name of the Contractor on certain U.S. Government lists designed to effect settlement of accounts of recalcitrant debtors and agrees not to transfer the case to the U.S. General Accounting Office or the Department of Justice before 45 days after the ASBCA decision on the appeal is published and to do so then only if the Contractor fails to comply with paragraph 4 above or fails to fulfill any agreement reached under paragraph 5 above.